

BILL ANALYSIS

S.B. 19
By: Nichols
Transportation
Committee Report (Unamended)

BACKGROUND AND PURPOSE

S.B. 792, 80th Legislature, Regular Session, 2007, enacted a moratorium on most comprehensive development agreements and created a "market valuation" process by which the Texas Department of Transportation (TxDOT) could proceed with certain transportation projects.

The market valuation process established under S.B. 792 is set to expire on August 31, 2011. Once this process expires, Texas will not have a process in statute to determine which tolling entity will build future toll projects.

S.B. 19 establishes a streamlined process for toll project development. It creates a first right of refusal guarantee (or primacy) for local toll entities to build future toll projects. S.B. 19 also allows tolling entities to complete environmental and other pre-project development work more quickly with the goal of expediting the primacy determination process. This process will ensure that TxDOT and its local tolling entity partners work within an established process with timelines and procedures for efficient project delivery.

S.B. 19 amends current law relating to the development, financing, construction, and operation of certain toll projects.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

ANALYSIS

SECTION 1. Amends Subtitle G, Title 6, Transportation Code, by adding Chapter 373, as follows:

CHAPTER 373. TOLL PROJECTS LOCATED IN TERRITORY OF LOCAL TOLL PROJECT ENTITY

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 373.001. DEFINITIONS. Defines "local toll project entity" and "toll project" in this chapter.

Sec. 373.002. APPLICABILITY. Provides that this chapter does not apply to:

- (1) a toll project described in Section 228.011 (Toll Projects in Certain Counties);
- (2) Phase 4 extension of the Dallas North Tollway in Collin and Denton Counties from U.S. 380 to the Grayson County line to be developed by North Texas Tollway Authority;
or
- (3) the North Tarrant Express project in Tarrant and Dallas Counties (Interstate Highway 820 and State Highway 121/State Highway 183 from Interstate Highway 35 West to State Highway 161, Interstate Highway 820 East from State Highway 121/State Highway 183 to Randol Mill Road, and Interstate Highway 35 West from Interstate Highway 30 to State Highway 170).

Sec. 373.003. PROJECT OWNED IN PERPETUITY. Provides that unless a toll project is leased, sold, conveyed, or otherwise transferred to another governmental entity in accordance with applicable law, including Sections 228.151 (Lease, Sale, or Transfer of Toll Project or System), 284.011 (Transfer of Project to Department), 366.036 (Transfer of Turnpike Project or System), 366.172 (Lease, Sale, or Conveyance of Turnpike Project), and 370.171 (Lease, Sale, or Conveyance of Transportation Project), a toll project procured by the Texas Department of Transportation (TxDOT) or a local toll project entity determined by the process under Subchapter B is owned by that entity in perpetuity.

Sec. 373.004. GOVERNMENTAL AND NOT COMMERCIAL TRANSACTIONS. Provides that a transaction involving a local toll project entity under Section 228.011 or this chapter is not primarily commercial in nature but is an inherently governmental transaction whose purpose is to determine governmental jurisdiction, ownership, control, or other responsibilities with respect to a project.

Sec. 373.005. LEGAL CHALLENGES CONCLUDED. Provides that for the purposes of this chapter, all legal challenges to development of a toll project are considered concluded when a judgment or order of a court with jurisdiction over the challenge becomes final and unappealable.

Sec. 373.006. TOLL PROJECT AGREEMENT. (a) Authorizes TxDOT and the local toll project entity, before initiating the primacy determination process under Subchapter B for a toll project, to enter into a toll project agreement that:

- (1) identifies the responsibilities of each party for project-related activities, which may include the performance of environmental work and traffic and revenue studies; and
- (2) includes an agreement that the primacy determination process under Subchapter B may be initiated earlier than as provided by Section 373.051.

(b) Authorizes a toll project agreement to provide an alternative to the primacy determination process under Subchapter B for toll project development, including an alternative timeline for the development of toll project phases.

Sec. 373.007. EXERCISE OF PRIMACY FOR TOLL PROJECT PHASES. Provides that unless otherwise provided by a toll project agreement under Section 373.006 or other agreement, an exercise of primacy under Subchapter B over a phase of a toll project is an exercise of primacy over the entire project, with additional phases to be developed as the entity determines the phases financially feasible.

[Reserves Sections 373.008-373.050 for expansion.]

SUBCHAPTER B. PROCESS TO DETERMINE ENTITY TO DEVELOP, FINANCE, CONSTRUCT, AND OPERATE TOLL PROJECT

Sec. 373.051. INITIATION OF PROCESS. (a) Authorizes a local toll project entity, at any time after a metropolitan planning organization approves the inclusion in the metropolitan transportation improvement program of a toll project to be located in the territory of the local toll project entity, to notify TxDOT in writing of the local toll project entity's intent to initiate the process described in this subchapter.

(b) Authorizes TxDOT to notify the local toll project entity in writing of TxDOT's intent to initiate the process described in this subchapter at any time after a metropolitan planning organization has approved the inclusion in the metropolitan transportation improvement program of a toll project to be located in the territory of a local toll project entity and:

- (1) TxDOT has issued a finding of no significant impact for the project, or for a project for which an environmental impact statement is prepared, TxDOT has approved the final environmental impact statement for the project; or
- (2) for a project subject to environmental review requirements under federal law, the United States Department of Transportation Federal Highway Administration

has issued a finding of no significant impact, or for a project for which an environmental impact statement is prepared, TxDOT has submitted a final environmental impact statement to the Federal Highway Administration for approval.

Sec. 373.052. LOCAL TOLL PROJECT ENTITY OPTION. (a) Provides that the local toll project entity has the first option to develop, finance, construct, and operate a toll project. Requires the local toll project entity to exercise its option not later than the later of:

(1) the 180th day after the date on which notification under Section 373.051(a) is provided or notification under Section 373.051(b) is received; or

(2) if the United States Department of Transportation Federal Highway Administration issues a record of decision for an environmental impact statement submitted by TxDOT under Section 373.051(b)(2) more than 60 days after the date TxDOT provides notice under Section 373.051(b), the 120th day after the date the record of decision is issued.

(b) Authorizes the extension of the option period under Subsection (a) for an additional 90 days by agreement of TxDOT and the local toll project entity.

(c) Requires the local toll project entity, if the local toll project entity exercises the option under Subsection (a), after exercising the option, to:

(1) advertise for the initial procurement of required services, including, at a minimum, design services, for the project, within 180 days after the later of the date of exercising its option or the date on which all environmental approvals necessary for the development of the toll project are secured and all legal challenges to development are concluded; and

(2) enter into a contract for the construction of the toll project, within two years after the later of the date of exercising its option or the date on which all environmental approvals necessary for the development are secured and all legal challenges to development are concluded.

Sec. 373.053. DEPARTMENT OPTION. (a) Provides that if the local toll project entity fails or declines to exercise the option to develop, finance, construct, and operate a toll project under Section 373.052(a), or fails or declines to advertise for procurement or enter into a construction contract as required by Section 373.052(c), TxDOT has the option to develop, finance, construct, and operate the toll project. Provides that TxDOT has not more than 60 days after the date the local toll project entity fails or declines to exercise its option under Section 373.052(a) or fails or declines to advertise for procurement or enter into a construction contract as required by Section 373.052(c) to exercise its option.

(b) Requires TxDOT, if TxDOT exercises its option under Subsection (a), after exercising the option, to:

(1) advertise for the initial procurement of required services, including, at a minimum, design services, for the project, within 180 days after the later of the date of exercising its option or the date on which all environmental approvals necessary for the development of the toll project are secured and all legal challenges to development are concluded; and

(2) enter into a contract for the construction of the toll project, within two years after the later of the date of exercising its option or the date on which all environmental approvals necessary for the development are secured and all legal challenges to development are concluded.

Sec. 373.054. REINITIATION OF PROCESS. Authorizes the local toll project entity or TxDOT, if the process described by Sections 373.051, 373.052, and 373.053 concludes without either entity entering into a contract for the construction of the toll project, to reinitiate the process under this subchapter by submitting notice to the other entity in the manner provided by Section 373.051.

Sec. 373.055. WAIVER OF OPTION; ALTERATION OF STEPS OR TIME LIMITS. (a) Authorizes TxDOT or the local toll project entity at any time before or during the process established by this subchapter to waive or decline to exercise any option, step, or other right under this subchapter that solely benefits that entity by notifying the other entity of its decision in writing.

(b) Authorizes TxDOT and the local toll project entity, by written agreement, to alter any other step or time limit under this subchapter, including the timing of or conditions for initiating the process under Section 373.051.

Sec. 373.056. SHARING OF PROJECT-RELATED INFORMATION. (a) Defines "project-related information" in this section.

(b) Requires TxDOT, on initiation of the process under Section 373.051, to make its project-related information available to the local toll project entity.

(c) Requires the local toll project entity, if the local toll project entity fails or declines to exercise an option or fails or declines to advertise for procurement or enter into a construction contract under Section 373.052, to make its project-related information available to TxDOT.

(d) Requires TxDOT or the local toll project entity, on entering into a contract for the construction of the toll project, as applicable, to reimburse the other entity for shared project-related information that it uses.

(e) Provides that use by an entity of project-related information received by the entity under this section is at the sole risk of the receiving entity and does not confer liability on the entity that furnished the information.

Sec. 373.057. PROGRESS REPORTS. Requires TxDOT or the local toll project entity, after TxDOT or the local toll project entity exercises an option under this subchapter, as applicable, to issue a semiannual report on the progress of the development of the toll project. Requires that the report be made available to the public.

Sec. 373.058. ENVIRONMENTAL REVIEW. (a) Authorizes TxDOT or the local toll project entity to begin any environmental review process that may be required for a proposed toll project before initiating the process under this subchapter.

(b) Requires the local toll project entity, if the local toll project entity initiates the process for development of a toll project under Section 373.051(a) and has not begun the environmental review of the project, to begin the environmental review within 180 days of exercising the option.

(c) Authorizes TxDOT or the local toll project entity to begin development of a toll project before the project receives environmental clearance but prohibits TxDOT or the local toll project entity from beginning construction of the project before the project receives that clearance.

Sec. 373.059. PROJECT LOCATED IN TERRITORY OF MORE THAN ONE LOCAL TOLL PROJECT ENTITY. Authorizes only the local toll project entity that first constructed toll projects, if a toll project is in the territory of more than one local toll project entity, to exercise the options and other rights under this subchapter. Authorizes the local toll project entity exercising an option or other right under this section to do so only with respect to the portion of the project located in the territory of that local toll project entity, and requires the local toll project entity exercising an option or other right under this section to do so on behalf of another local toll project entity in whose territory the project will be located if requested by the other entity after the original entity declines to exercise its option.

[Reserves Sections 373.060-373.100 for expansion.]

SUBCHAPTER C. USE OF RIGHT-OF-WAY BY LOCAL TOLL PROJECT ENTITY

Sec. 373.101. USE OF STATE HIGHWAY RIGHT-OF-WAY. (a) Requires the Texas Transportation Commission (TTC) and TxDOT, consistent with federal law, to assist a local toll project entity in the development, financing, construction, and operation of a toll project for which the local toll project entity has exercised its option to develop, finance, construct, and operate the project under Subchapter B by allowing the local toll project entity to use state highway right-of-way and to access the state highway system as necessary to construct and operate the toll project.

(b) Authorizes a local toll project entity and TTC, notwithstanding any other law, to agree to remove the toll project from the state highway system and transfer ownership to the local toll project entity.

Sec. 373.102. REIMBURSEMENT FOR USE OF RIGHT-OF-WAY. (a) Prohibits TTC or TxDOT from requiring a local toll project entity to pay for the use of state highway right-of-way or access, except:

(1) to reimburse TxDOT for actual costs incurred by TxDOT that are owed to a third party, including the federal government, as a result of that use by the local toll project entity; and

(2) as required under Subsection (b).

(b) Requires a local toll project entity to reimburse TxDOT for TxDOT's actual costs to acquire a right-of-way transferred to the local toll project entity. Requires that the reimbursement, if TxDOT is not able to determine that amount, be in an amount equal to the average actual historical right-of-way acquisition values for comparable right-of-way located in proximity to the project on the date of original acquisition of the right-of-way.

(c) Authorizes the local toll project entity, in lieu of reimbursement, and at the local toll project entity's sole option, to agree to pay to TxDOT a portion of the revenues of the project, in the amount and for the period of time agreed to by the local toll project entity and TxDOT.

(d) Requires that money received by TxDOT under this section be deposited in the state highway fund and, except for reimbursement for costs owed to a third party, be used to fund additional projects in the TxDOT district in which the toll project is located.

(e) Requires TxDOT to reimburse a local toll project entity for any cost of right-of-way acquired by the entity for a toll project that will be developed, financed, constructed, and operated by TxDOT.

(f) Authorizes TTC or TxDOT or the local toll project entity to waive the requirement of reimbursement under this section.

Sec. 373.103. AGREEMENT FOR USE OF RIGHT-OF-WAY. Requires a local toll project entity and TxDOT to enter into an agreement for any toll project for which the entity has exercised its option to develop, finance, construct, and operate the project under Subchapter B and for which the entity intends to use state highway right-of-way. Requires that the agreement contain provisions necessary to:

(1) ensure that the local toll project entity's construction, maintenance, and operation of the project complies with the requirements of applicable state and federal law; and

(2) protect the interests of TTC and TxDOT in the use of right-of-way for operations of TxDOT, including public safety and congestion mitigation on the right-of-way.

Sec. 373.104. LIABILITY FOR DAMAGES. (a) Provides that, notwithstanding any other law, TTC and TxDOT are not liable for any damages that result from a local toll project entity's use of state highway right-of-way or access to the state highway system under this subchapter, regardless of the legal theory, statute, or cause of action under which liability is asserted.

(b) Provides that an agreement entered into by a local toll project entity and TxDOT in connection with a toll project that is developed, financed, constructed, or operated by the

local toll project entity and that is on or directly connected to a highway in the state highway system does not create a joint enterprise for liability purposes.

Sec. 373.105. COMPLIANCE WITH FEDERAL LAW. Authorizes TTC or TxDOT, notwithstanding an action taken by a local toll project entity under this subchapter, to take any action that in its reasonable judgment is necessary to comply with any federal requirement to enable this state to receive federal-aid highway funds.

SECTION 2. Amends Section 228.006, Transportation Code, by amending Subsection (a) and adding Subsection (a-1), as follows:

(a) Requires TTC to authorize the use of surplus revenue of a toll project or system to pay the costs of a transportation project, highway project, or air quality project within a region, rather than a TxDOT district, in which any part of the toll project is located.

(a-1) Requires TxDOT to allocate the distribution of the surplus toll revenue to TxDOT districts in the region that are located in the boundaries of the metropolitan planning organization in which the toll project or system producing the surplus revenue is located based on the percentage of toll revenue from users in each TxDOT district of the project or system. Requires each entity responsible for collecting tolls for a project or system, to assist TxDOT in determining the allocation, to calculate on an annual basis the percentage of toll revenue from users of the project or system in each TxDOT district based on the number of recorded electronic toll collections.

SECTION 3. Amends Section 228.011(a), Transportation Code, to provide that this section applies only to a county acting under Chapter 284 (Causeways, Bridges, Tunnels, Turnpikes, Ferries, and Highways in Certain Counties) for certain purposes, including the widening, expansion, reconstruction, and continued operation of existing toll projects of the county. Makes nonsubstantive changes.

SECTION 4. Amends Section 228.012, Transportation Code, as follows:

Sec. 228.012. PROJECT SUBACCOUNTS. (a) Deletes existing text requiring TxDOT to create a separate account in the state highway fund to hold payments received under Sections 228.0111(g)(2) (relating to requirements for a local toll project entity, after exercising the option to develop a project) and (i)(2) (relating to requirements for TxDOT, after exercising the option to develop a project).

(b) Deletes existing text providing an exception under Subsection (c), relating to the allocation of certain money.

(c) Redesignates existing Subsection (d) as Subsection (c). Deletes existing Subsection (c) requiring that money in a subaccount received from a county or TxDOT under Section 228.0111 (Toll Projects of Local Toll Project Entities) in connection with a project for which a county acting under Chapter 284 has the first option be allocated to transportation projects located in the county and the counties contiguous to that county.

(d) Redesignates existing Subsection (e) as Subsection (d). Prohibits TTC or TxDOT from revising the formula as provided in TxDOT's unified transportation program or a successor document in a manner that results in a decrease of a TxDOT district's allocation because of the deposit of a payment into a project subaccount, or from taking any other action that would reduce funding allocated to a TxDOT district because of the deposit of a payment, rather than the deposit of a payment received from TxDOT or local toll project entity, into a project subaccount. Deletes existing text prohibiting TTC or TxDOT from revising the formula in a certain manner or taking any action that would reduce certain funding because of a commitment to undertake an additional transportation project under Section 228.0111.

SECTION 5. Amends Section 284.004(b), Transportation Code, to authorize a county, in addition to authority granted by other law, to use state highway right-of-way and to access state highway right-of-way in accordance with Sections 228.011, 373.101, and 373.102, rather than Sections 228.011 and 228.0111.

SECTION 6. Amends Section 284.061(d), Transportation Code, to provide that subject to the reimbursement requirements of Section 373.102, a county has full easements and rights-of-way through,

across, under, and over any property owned by this state that are necessary or convenient to construct, acquire, or efficiently operate a project under this chapter. Makes a nonsubstantive change.

SECTION 7. Amends Section 366.170(c), Transportation Code, to provide that this subsection does not affect the obligation of the authority under other state law, including Section 373.102, to compensate or reimburse the state for the use or acquisition of an easement or right-of-way on property owned by or on behalf of the state.

SECTION 8. Amends Section 370.169(c), Transportation Code, to provide that this subsection does not affect the obligation of the authority under other law, including Section 373.102, to compensate or reimburse this state for the use or acquisition of an easement or right-of-way on property owned by or on behalf of this state.

SECTION 9. Amends Subchapter A, Chapter 371, Transportation Code, by adding Section 371.003, as follows:

Sec. 371.003. VALUATION DETERMINATION. Requires that any determination of value, including best value, under applicable federal or state law for a comprehensive development agreement or other public-private partnership arrangement involving a toll project take into consideration any factors the toll project entity determines appropriate, including factors related to:

- (1) oversight of the toll project;
- (2) maintenance and operations costs of the toll project;
- (3) the structure and rates of tolls;
- (4) economic development impacts of the toll project; and
- (5) social and environmental benefits and impacts of the toll project.

SECTION 10. Amends the heading to Section 371.052, Transportation Code, to read as follows:

Sec. 371.052. NOTIFICATION TO LEGISLATIVE BUDGET BOARD.

SECTION 11. Repealers: Sections 228.0111 (Toll Projects of Local Toll Project Entities) and 371.052(c) (relating to comprehensive development agreements), Transportation Code.

SECTION 12. Provides that Section 228.012, Transportation Code, as amended by this Act, applies only to payments received by TxDOT under that section on or after the effective date of this Act. Provides that payments received by TxDOT under Section 228.012, Transportation Code, before the effective date of this Act are governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 13. Provides that the repeal of Section 228.0111, Transportation Code, by this Act does not affect any project agreement, agreement regarding a negotiated value, market value agreement, market valuation waiver agreement, memorandum of understanding regarding market valuation, letter agreement regarding market valuation analysis, advance funding agreement, or other agreement entered into between TxDOT and a local toll project entity, or any resolution or minute order adopted by TxDOT or a local toll project entity, under that repealed section. Provides that if a waiver of market valuation or waiver of first option to develop, finance, construct, or operate a toll project is withdrawn or terminated subsequent to the effective date of this Act, TxDOT and the local toll project entity have the rights regarding the applicable project as exist under Chapter 373, Transportation Code, as added by this Act.

SECTION 14. Effective date: upon passage or September 1, 2011.

EFFECTIVE DATE

Upon passage, or, if the Act does not receive the necessary vote, the Act takes effect September 1, 2011.